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# JUDICIAL SELECTION IN NEW YORK: A NEED FOR CHANGE

## I. Introduction

On February 27, 1974 Chief Judge Charles D. Breitel of the New York State Court of Appeals addressed the New York Legislature regarding the "State of the Judiciary and Judicial System" and presented dramatic proposals for the reform of the New York state court system.<sup>1</sup> In resurrecting the problem of court reform,<sup>2</sup> the Chief Judge focused in part on one particularly controversial area—the selection of the judiciary.<sup>3</sup>

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1. Address by Charles D. Breitel, Chief Judge of the New York Court of Appeals, Special Joint Meeting of the New York Legislature, Feb. 27, 1974, in 46 N.Y. St. B.J. 229 (1974). See also 171 N.Y.L.J. 4, col. 3 (Feb. 28, 1974); N.Y. Times, Feb. 28, 1974, at 1, col. 5.

2. The subject of court reform has generated a great deal of legal discussion. See, e.g., ASHMAN & ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* (1974) [hereinafter cited as ASHMAN & ALFINI]; *SELECTED READINGS—JUDICIAL DISCIPLINE AND REMOVAL* (G. Winters ed., rev. ed. 1973); *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* (G. Winters ed., rev. ed. 1973); Campbell, *Judicial Selection and Judicial Impartiality*, 1973 JURID. REV. 254 [hereinafter cited as Campbell]; Cooperman, *Selection of Judges*, 37 QUEENS B. BULL. 7 (1973) [hereinafter cited as Cooperman]; Garwood, *Judicial Revision—An Argument for the Merit Plan for Judicial Selection and Tenure*, 5 TEXAS TECH. L. REV. 1 (1973); Gasperini, Anderson & McGinley, *Judicial Removal in New York: A New Look—Revisited*, 28 RECORD OF N.Y.C.B.A. 217 (1973); Gasperini, Anderson & McGinley, *Judicial Removal in New York: A New Look*, 40 FORDHAM L. REV. 1 (1971); Kaminsky, *Judicial Selection: Alternative to the Status Quo in the Selection of State Court Judges*, 48 ST. JOHN'S L. REV. 496 [hereinafter cited as Kaminsky]; New York City Bar Ass'n Comm. on State Courts of Superior Jurisdiction, *The Selection of Judges*, 28 RECORD OF N.Y.C.B.A. 372 (1973) [hereinafter cited as *Selection of Judges*]; Robertson & Gordon, *Merit Screening of Judges in Massachusetts*, 58 MASS. L.Q. 131 (1973); Note, *Judicial Selection and Tenure—The Merit Plan In Ohio*, 42 U. CINN. L. REV. 255 (1973) [hereinafter cited as *Judicial Selection*].

3. Chief Judge Breitel's proposals require changes in the methods of judicial selection and discipline as well as modifications in the financing and structure of the court system. Goldstein, *Court Reform Politics*, N.Y. Times, Feb. 28, 1974, at 34, col. 1.

New Yorkers, as well as many other Americans,<sup>4</sup> have become increasingly cognizant of the problem of inefficient administration of the judicial system by some of our nation's state and federal judges.<sup>5</sup> Such inept direction and judicial misconduct in our courts have caused the inequitable and unconstitutional adjudication of numerous cases.<sup>6</sup> A full awareness of the extent and potential impact of the problem occurs when one examines the influence exerted by judges in the American system,<sup>7</sup> and the ever increasing delays in our courts, especially in our urban areas.<sup>8</sup> Such an examination, coupled with an inquiry into the qualifications of some of the trial judges, will cause one to appreciate more fully the 1961 campaign statement made by New York City's former Mayor, Robert F. Wagner, prior to his establishing the "Mayor's Committee on the Judiciary." He stated:

It has long been my conviction that our judges should be removed as far as possible from political control, and particularly that judgeships should never be used as rewards for political service.<sup>9</sup>

Although the need for some type of nonpolitical selection has often been acknowledged, proposals as to the type and manner of such selection have varied and are in constant dispute.<sup>10</sup> Chief Judge

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4. The problem of unfit judges is not limited to New York City, but is prevalent in other urban areas. Cf. Buckley, *The Commission on Judicial Qualifications: An Attempt To Deal With Judicial Misconduct*, 3 U. SAN FRAN. L. REV. 244, 245-50 (1969) [hereinafter cited as Buckley] (written by the Los Angeles Public Defender and based on the experience in the Los Angeles County Court System of the 248 man Los Angeles Public Defender's Office).

5. The press has properly taken on the role of judicial watchdog. See, e.g., Newfield, *The Next Ten Worst Judges*, *The Village Voice*, Sept. 26, 1974, at 5, col. 1; Newfield, *The Ten Worst Judges in New York*, *NEW YORK MAGAZINE*, Oct. 16, 1972, at 32.

6. See text accompanying notes 17-43 *infra*. See also Buckley 245-50.

7. Buckley 244-50.

8. See Gazell, *Indicators of Managerial Consciousness In An Urban Judicial Bureaucracy*, 49 DEN. L.J. 489, 493-95 (1973).

9. *New York City Bar Ass'n, Special Comm. On Judicial Selection and Tenure*, 18 RECORD OF N.Y.C.B.A. 581, 587 (1963).

10. See, e.g., Cooperman; Buesser & Kopel, *Judicial Appointment or Judicial Election Appointment*, 41 DET. LAW. 6 (Sept. 1973); Goldstein,

Breitel's legislative proposals for the selection of judges are in the form of amendments to the state constitution and the New York Judiciary Law.<sup>11</sup>

Based on a similar California plan for the selection of judges,<sup>12</sup> Chief Judge Breitel would have all New York judges appointed by the governor, mayor or county executive, and then confirmed or rejected by a confirmation committee.<sup>13</sup> The confirmation committee would be composed of nineteen members: three laymen appointed by the governor; one judge, two attorneys and a layman appointed by the chief judge of the court of appeals; one layman and one attorney appointed by the speaker of the assembly; one layman and one attorney appointed by the senate majority leader; one layman and one attorney appointed by the senate minority leader; one layman and one attorney appointed by the assembly minority leader; and one judge each appointed by the presiding justices of the four departments of the appellate divisions.<sup>14</sup>

Although this bill died in the State Assembly Rules Committee on the Judiciary,<sup>15</sup> Chief Judge Breitel will apparently continue to

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*Judicial Groups Split On Reform*, N.Y. Times, Mar. 3, 1974, § 1, at 30, col. 1; 171 N.Y.L.J. 1, col. 3 (Mar. 19, 1974).

11. Chief Judge Breitel's proposals have caused a great deal of discussion among the state's executive, legislative, and judiciary members as well as political leaders, bar associations, and citizens' committees as to the type of reforms. See Goldstein, *Judicial Groups Split On Reform*, N.Y. Times, Mar. 3, 1974, at 30, col. 1; *id.* Mar. 14, 1974, at 74, col. 6.

12. CAL. CONST. art. 6, §§ 7, 16(d); CAL. GOV'T CODE § 1, col. 3 (Mar. 19, 1974). § 68121 (West 1964), *as amended*, (West Supp. 1974).

13. Chief Judge Breitel presented his legislative package of seven bills for the reformation of New York's courts on Mar. 19, 1974. 171 N.Y.L.J. 1, col. 3 (Mar. 20, 1974). The pertinent bill under view is S. 9983, 197th Sess. (1974) which would amend article VI of the New York State Constitution and would provide for such a confirmation committee.

14. S. 9983, 197th Sess. (1974).

15. 58 J. AM. JUD. Soc'y 98 (1974). The Legislature rejected a modification of Judge Breitel's proposal, previously approved by the state senate, which allowed the appointment of the court of appeals judges. It also passed a measure, opposed by the chief judge as infringing on the independence of the judiciary, which would create an independent nine member commission to review judicial conduct. *Id.* See also 171 N.Y.L.J. 1, col. 3 (Mar. 28, 1974). The bill adding article 2A to the New York Judiciary

strive for the adoption of this reform<sup>16</sup> as well as others.<sup>17</sup>

This Note will explore the problems resulting from the selection of unfit judges. It will also evaluate New York State's present provisions for judicial selection and Chief Judge Breitel's reform measures in light of the success of similar plans instituted in California and Missouri. In addition, the new selection plan of Governor Hugh L. Carey will be examined.

## II. The Problem of the Unfit Judge

The problem of selecting and retaining incompetent judges can only be appreciated when one realizes the vital role a judge plays in our system of justice. It is the judge who must apply the proper legal principles to the set of facts; decide if legislation is constitutional, proper procedure has been followed, crucial evidence is admissible, a criminal defendant or civil litigant has been denied his constitutional rights; and if a case does in fact exist. Ultimately it is the judge who controls the rendering of justice by his administration of the law and court procedures.<sup>18</sup>

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Law was adopted by the Legislature. N.Y. JUDICIARY LAW §§ 40-45 (McKinney Supp. 1974).

16. 58 J. AM. JUD. Soc'y 98 (1974).

17. Although Chief Judge Breitel opposes the nine member commission established by section 41 of the New York Judiciary Law, he has proposed the creation of a statewide commission on judicial conduct which would investigate complaints of judicial misconduct and would recommend to the appropriate appellate division or the court of appeals the censure, removal or retirement of judges. See S. 9980, 197th Sess. (1974). This would abolish New York's present disciplinary system, which has been proven to be ineffective, and establish an added safeguard insuring the continued existence of a competent judiciary. See text accompanying note 1 *supra*. See also N.Y.S. COMMISSION OF INVESTIGATION, REPORT CONCERNING DISCIPLINE OF THE JUDICIARY IN THE FIRST AND SECOND JUDICIAL DEPARTMENTS 30-33 (1974) [hereinafter cited as COMMISSION OF INVESTIGATION REPORT].

18. "The quality of the judiciary in large measure determines the quality of justice. It is the judge who tries disputed cases and who supervises and reviews negotiated dispositions. Through sentencing the judge determines the treatment given an offender. Through the exercise of his administrative power over his court he determines its efficiency, fairness, and effectiveness. No procedural or administrative reforms will help the courts, and no reorganizational plan will avail unless the judges have the highest qualifications, are fully trained and competent, and have high standards

It is at the trial stage that the judge's role is of the utmost importance, since it is at this level that the majority of cases are adjudicated.<sup>19</sup> In addition, disputes concerning material facts are resolved at this level.<sup>20</sup> Normally the appellate courts will rely on the factual basis established in the trial court when reaching any further decisions on the case; with limited exceptions the appellate courts' jurisdiction is restricted, by the state's constitution or statutes, to questions of law.<sup>21</sup>

Despite the importance of the judge, the judiciary has been the least scrutinized branch of government. Most people have little contact with our courts and those who do, with the exception of the bar, are normally not in a position to exert any substantial influence in the adoption of needed court reforms. Although the vast majority of our civil and criminal trial judges are competent, the relatively few unfit judges have a deleterious effect on the lives of a number of people and have led to a crisis of confidence in our judiciary.<sup>22</sup>

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of performance." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 146 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

19. *The Trial Judge—Role Analysis and Profile In The Courts*, in *THE PUBLIC AND THE LAW EXPLOSION* 131-145 (H. Jones ed. 1965); Buckley 244-50.

20. "Because appellate judges enunciate rules and principles to govern future cases, it is essential that they have both wisdom and sensitivity to the practical problems of law enforcement. But the trial judge exerts a far greater influence on the quality of justice. For the principles of appellate decisions are viable only when they [are] applied to facts, and the trial judge supervises the fact finding process. When he serves as a trier of fact on issues such as search and seizure and confessions, the trial judge has almost absolute power to assess the credibility of witnesses and to resolve conflicting testimony. A trial judge's decision to acquit even in the face of strong evidence of guilt may not be appealed, and it bars further prosecution. Through his attitude or expressions the trial judge may influence the jury's determination of factual issues in a way which will not be reflected in the record before an appellate court." SELECTED READINGS—JUDICIAL SELECTION AND TENURE 214 (G. Winters ed., rev. ed. 1973).

21. See, e.g., N.Y. CONST. art. 6, § 3(a).

22. *Selection of Judges* 372; Address by Henry T. Reath, National Conference on Judicial Selection and Tenure, Mar. 20-22, 1974, on file in the office of the *Fordham Urban Law Journal* [hereinafter cited as Reath Address].

This lack of confidence is not limited to the legal profession, but has extended to the general public.<sup>23</sup> It is clear that the shortcomings of the judicial system cannot be attributed solely to the judges sitting on the bench since antiquated facilities, a constant increase in the court docket, and the lack of a sufficient number of judges contribute substantially to the problem. However, it is still the judge who is ultimately entrusted with the administration of justice in our courtrooms and it is with him that our court reforms must originate.<sup>24</sup>

The problem of unfit judges<sup>25</sup> in New York has been extensively

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23. Many citizens and politicians consider "that the appointment of a judge is just another political appointment—a matter of patronage, a reward for political activity and party loyalty." Address by John S. Clark, President of the American Judicature Society, National Conference on Judicial Selection and Tenure, Denver, Colo., Mar. 20-22, 1974, on file in the office of the *Fordham Urban Law Journal* [hereinafter cited as Clark Address].

24. See PRESIDENT'S COMMISSION 146; Newfield, *The Next Ten Worst Judges*, *The Village Voice*, Sept. 26, 1974 at 5, col. 1; Newfield, *The Ten Worst Judges In New York*, *NEW YORK MAGAZINE*, Oct. 16, 1972, at 32.

25. Recent reports made by state investigation committees in the area of sentencing indicate the scope of this problem. These reports disclose that deaths resulting from the use of illegal guns have increased annually. N.Y.ST. SELECT COMM. ON CRIME, *GUN CONTROL IN NEW YORK 1* (Oct. 1974) [hereinafter cited as COMMITTEE ON CRIME]; N.Y.S. COMMISSION OF INVESTIGATION, *REPORT CONCERNING THE AVAILABILITY, ILLEGAL POSSESSION AND USE OF HANDGUNS IN NEW YORK STATE* (Oct. 17, 1974). The Commission of Investigation concluded that the reason for such increases is reportedly due to the "failure of the criminal justice system to enforce the gun control laws of New York, supposedly the toughest in the country." COMMITTEE ON CRIME 1. Both statistics and individual case studies compiled by the committee support this conclusion. *Id.* at 2-3. The statistics are provided in Table 1.

TABLE 1  
DANGEROUS WEAPONS FELONIES 1968-1972

Year	Area	Arrests	Indictments	Felony Convictions	Prison Sentences
1968	N.Y. State	4217	1247	301	83
1972	N.Y. State	7508	3750	1938	251
1972	N.Y. City	3625	5625	1310	223

examined in two recent studies: the April 8, 1974 *Report of the New York State Commission of Investigation Concerning Discipline of the Judiciary in the First and Second Judicial Departments* (Commission of Investigation's Report)<sup>26</sup> and the January 1972 *Report of the Temporary Commission on the New York State Court System* (Dominick Report).<sup>27</sup> The Dominick Report identified and summarized the various types of judicial incapacity and misconduct.<sup>28</sup> Listed in order of seriousness, they are:

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In New York City less than 4% of those convicted of violations of gun control laws received prison sentences. However, individual case studies more dramatically disclose the "lack of concern within the criminal justice system," of which our judges play such a key role, toward the dangerous weapons offenders. See COMMITTEE ON CRIME, App. A, at 1-2. The report discusses the trial of one James Brown on charges of possession of an illegal handgun. He pleaded guilty to four separate charges and received two probation sentences and two conditional discharges. See also N.Y. ST. SELECT COMM. ON CRIME, A STUDY OF ILLEGAL NARCOTICS SENTENCES IN NEW YORK COUNTY 2 (Sept. 27, 1974) [hereinafter cited as NARCOTICS SENTENCES]. That investigation concluded that during a four year period from 1969 through 1972 "at least 67 such illegal sentences [were] imposed on New York County defendants pleading guilty to a felony charge of either selling or possessing dangerous drugs." *Id.* at 2. Furthermore, a sharp contrast in sentencing is reflected in cases discussed in the report. In one case the defendant who was convicted of selling a minute amount of heroin, had no prior convictions for drug related offenses and was sentenced to the maximum 10 years in prison. *Id.* at 1. In another, the defendant was convicted of selling a small amount of heroin, had one previous misdemeanor conviction for possession of drugs and was sentenced to a 7 year term. *Id.* But in a third case, the defendant was convicted of possession of 150 envelopes of heroin, had a record of 27 prior arrests and was given an unconditional discharge. *Id.* App. A, at 2. And in still another case, the defendant was convicted of illegal possession of drugs, had ten prior arrests and was given a conditional discharge. *Id.* App. A, at 5.

26. COMMISSION OF INVESTIGATION REPORT 1. The investigation was limited to the appellate division's first and second departments.

27. 2 REPORT OF THE TEMPORARY COMMISSION ON THE NEW YORK STATE COURT SYSTEM (Jan. 1973) [hereinafter cited as DOMINICK REPORT]. The Commission is more popularly known as the Dominick Commission, after its chairman, State Senator Clinton Dominick.

28. *Id.* The report is in three volumes. The first contains a Summary of Recommendations, the second is titled Administrating the Court System, and the last is titled Financing the Court System.



### Conduct on the bench

- administrative misconduct—such as, not filling out reports, not wearing robe, not advising proper officer of actions
- laziness—such as, starting court late, ending early, taking afternoons or days off, taking extended vacations, not appearing at scheduled cases without explanation, slowness in deciding cases
- lack of patience with persons in court—such as, cutting off counsel and witnesses, being abrupt with court personnel
- rudeness and arbitrariness—such as, shouting at, berating, or making derogatory comments about persons in court
- improper use of alcohol—such as, appearing in court with odor of liquor on breath or partially under influence of alcohol
- inability to hold court because under influence of alcohol
- showing bias against certain classes of litigants—such as, making derogatory comments based on race, religion, or other characteristics of persons in court
- allowing personal considerations to influence judicial decisions—such as, favoring friends or making decisions which would indirectly favor self or friends
- corruptions in office—such as, agreeing to decide a case to favor a party in exchange for money

### Conduct off the bench

- devoting excessive time to nonjudicial duties
- excessive concern with publicity
- financial 'wheeling and dealing'
- indirect political activity
- associations with persons that give rise to suspicions about partiality—for example, litigants, politicians, lawyers or reputed underworld figures
- running for public or political office
- engaging in immoral conduct
- engaging in illegal conduct
- engaging in illegal conduct that involves moral turpitude

### Physical and Mental Problems

- inability to make up mind
- physical infirmities that interfere with judicial activity
- psychological problems that interfere with judicial activity
- habitual drunkenness
- physical or mental disability that completely prevents exercise of judicial functions<sup>29</sup>

### The New York State Commission of Investigation Report con-

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29. *Id.* at 60-61.

sisted of a review of 376 complaints that were filed between 1968 and 1972 and were contained in the previously unreviewed and confidential files of the appellate division, previously published newspaper articles regarding cases of judicial misconduct, and an unpublished study made by the New York City Bar Association.<sup>30</sup>

The investigation showed that one judge<sup>31</sup> was compelled to resign as a result of the preparation of the requisite charges demanding his removal by New York's Court on the Judiciary.<sup>32</sup> Such charges were instituted in light of an investigation into the judge's alleged participation in fixing a case heard by him, and his alleged organized crime connections.<sup>33</sup> Similarly, a judge faced with charges of improperly using his influence in obtaining zoning changes resigned after an inquiry<sup>34</sup> resulted in his being served with charges by the Court on the Judiciary.<sup>35</sup>

In *People v. Gentile*,<sup>36</sup> the appellate division reversed a trial judge's dismissal of an indictment.<sup>37</sup> The reversal was based on the trial judge's failure to read the grand jury minutes, as required by normal court procedure, to determine whether there was sufficient evidence for the grand jury to indict.<sup>38</sup>

Judicial misconduct in the form of intemperance is revealed in the case of a civil court judge who had three complaints filed against

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30. COMMISSION OF INVESTIGATION REPORT 4.

31. *Id.* at 10-11.

32. *Id.* at 11.

33. *Id.* at 10.

34. *Id.* at 13.

35. *Id.*

36. 20 App. Div. 2d 412, 247 N.Y.S.2d 551 (1st Dep't 1964).

37. *Id.* at 414, 247 N.Y.S.2d at 554; see COMMISSION OF INVESTIGATION REPORT 16.

38. 20 App. Div. 2d at 414, 247 N.Y.S.2d 554. This same judge in a later 1971 case, *People v. Ward*, 66 Misc. 2d 392, 323 N.Y.S.2d 309 (Sup. Ct. 1971), dismissed a perjury indictment, concluding that the defendant's conflicting testimony was a product of apparent confusion and aggressive questioning by the district attorney. *Id.* at 395-96, 323 N.Y.S.2d at 313-14. The appellate division reversed this judge once again, holding that any explanation or defense was for the jury to consider and was not a sufficient ground for a motion to dismiss. 37 App. Div. 2d 174, 176, 323 N.Y.S.2d 316, 318 (1st Dep't 1971). Subsequently, the defendant was convicted. COMMISSION OF INVESTIGATION REPORT 17.

him. As a result of the second complaint charging intemperant and abusive treatment of persons in his courtroom, he was informally warned by the appellate division that any further complaints would result in the filing of formal charges for his removal.<sup>39</sup>

In *In re Suglia*,<sup>40</sup> charges were made of improper exercise of judicial discretion in return for sexual favors.<sup>41</sup> Despite findings that the judge did in fact violate important provisions of the Canons of Judicial Ethics, and a recommendation that appropriate disciplinary action be taken, the appellate division merely censured the judge.<sup>42</sup>

The State Committee of Investigation's report concluded that a number of the Canons of the Codes of Judicial Ethics and Conduct, the rules prescribing standards for judicial conduct and action, are often wholly ignored by the judiciary.<sup>43</sup>

### III. Selection of Judges

#### A. Historical Development

New York traces its methods of judicial selection and tenure to England.<sup>44</sup> Prior to 1701, the English royal courts were viewed as part of the executive, and the judges were appointed by and served at the sole discretion of the King.<sup>45</sup> Following the American Revolution, the colonists, disgruntled by the English Kings' oppressive control of the judiciary, attempted to establish methods of judicial appointment which would insure against any similar abuses by the executive branch.<sup>46</sup> As a result, three new appointive systems were instituted by the thirteen states: appointment by the legislature,<sup>47</sup>

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39. COMMISSION OF INVESTIGATION REPORT 18.

40. 36 App. Div. 2d 326, 320 N.Y.S.2d 352 (1st Dep't 1971).

41. *Id.* at 327, 320 N.Y.S.2d at 353-54. See also COMMISSION OF INVESTIGATION REPORT 27.

42. 36 App. Div. 2d at 328, 320 N.Y.S.2d at 354; see COMMISSION OF INVESTIGATION REPORT 24.

43. COMMISSION OF INVESTIGATION REPORT 2, 24-28.

44. ASHMAN & ALFINI 7-8; Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 12-19 (1962) [hereinafter cited as Nelson]; Niles, *The Popular Election of Judges in Historical Perspective*, 21 RECORD OF N.Y.C.B.A. 523, 524 (1966) [hereinafter cited as Niles, *Historical Perspective*].

45. ASHMAN & ALFINI 8.

46. *Id.*

47. Eight states vested appointment in one or both of the legislative

appointment by the governor and his council,<sup>48</sup> and appointment by the governor subject to approval by a council.<sup>49</sup> New York adopted the last of the three methods at its 1777 State Constitutional Convention.<sup>50</sup> However, since the voting privilege was limited to landowners, a few wealthy landowning families were able to, in effect, select the members of the state's executive and legislative branches and thereby control the state's judicial appointments.<sup>51</sup> The ideal of an independent judiciary clearly was not in existence during this period.<sup>52</sup>

The 1846 Constitutional Convention reflected the Jacksonian political philosophy that, in order to preserve equality among men, all public officials, including judges, should be elected. The delegates attacked the appointive system as creating an "elite class," and subsequently abolished the appointive method, establishing an elected judiciary.<sup>53</sup>

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houses. The states adopting this method were Connecticut, Delaware, Georgia, New Jersey, North Carolina, Rhode Island, South Carolina, and Virginia. Nelson 14 n.47.

48. Two states, New Hampshire and Pennsylvania, adopted this method. *Id.* at 14 n.46.

49. Three states, New York, Maryland, and Massachusetts, adopted this method. *Id.* at 14 n.45.

50. N.Y. CONST. OF 1777, art. xxiii; see Niles, *Historical Prospective* 532 n. 11.

51. Niles, *Historical Perspective* 523-24. Control of the judiciary was very important since these landowners were in constant litigation over landlord-tenant disputes. *Id.*

52. A significant blow to this antiquated feudalistic control resulted from the abolition of the ownership of property qualification as a prerequisite to voting. In addition the state constitution was amended to provide for the confirmation of the governor's judicial appointments by the senate itself, instead of the Council for the Appointment of Officers. N.Y. CONST. of 1821, art. IV, § 7. See Niles, *Historical Perspective* 532 n.11.

53. Niles, *Historical Perspective* 526-27. However, it is interesting to note some questions posed by one of the delegation who favored the retention of the appointive system: "Will not the judge be apt to remember the man who greatly promoted, perhaps secured his election? Will he forget him who opposed him with zeal and energy, and perhaps intemperate heat? In view of re-election, will he be sure to do impartial and exact justice in a controversy between the powerful and the powerless? Between

The New York constitutional conventions which followed saw a number of challenges to the elective method, but none succeeded.<sup>54</sup> However, with the post-Civil War period came industrialization, which in turn led to the growth of large cities.<sup>55</sup> The move toward urbanization resulted in the creation of the well-known "political machines" of our day.<sup>56</sup> It soon became apparent that in the large urban areas the elective method had degenerated into de facto appointive systems.<sup>57</sup> Attempts to have appellate division justices elected caused a great debate amongst the judiciary in the 1890s and at the 1894 constitutional convention. Ultimately such a proposal was defeated.<sup>58</sup> At this same convention, however, the Mayor of New York City was given the power to appoint judges to the New York City Criminal Court.<sup>59</sup> Despite persistent rumbles of discontent, no significant effort was made to bring about any statewide counterreforms until the 1967 constitutional convention.

Under New York's present system, the majority of New York judges are elected. The exceptions are judges appointed to the New York City Criminal and Family Courts by the mayor, the appellate division judges selected by the governor for five year terms from present supreme court justices, and court of claims judges appointed by the governor.<sup>60</sup>

In light of the recent revelations of political corruption within all branches of our state and federal government, a number of the state's bar associations<sup>61</sup> and prominent legal minds have stepped

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him who may control many votes and him who can control none?" *Id.* at 526.

54. *Id.* at 528-29.

55. ASHMAN & ALFINI 9.

56. *Id.*

57. Niles, *Historical Perspective* 529. The growing dissatisfaction with the political controls exerted over the judiciary, led to the establishment of the Association of the Bar of the City of New York in 1870, which in turn led in the fight to improve the popular elective method and thereby free the judiciary from such influence. See ASHMAN & ALFINI 10.

58. Niles, *Historical Perspective* 530.

59. Kaminsky 503.

60. The relevant New York constitutional provisions providing for these selection methods are N.Y. CONST. art. VI, §§ 2, 4c-d, 6c, 9, 12b, 13a, 15a, 16h, 17d, 21.

61. The American Bar Association, the New York State Bar Associa-

up their efforts to have some form of a merit selection plan adopted.<sup>62</sup> Despite this increased effort, proposed judicial selection reforms contained in the proposed judiciary article of the 1967 New York State Constitution have not been enacted.<sup>63</sup>

## B. Evaluating the Methods of Judicial Selection

### 1. Partisan and Nonpartisan Elections

It is apparent that the existing system of selecting members of the judiciary in New York is not satisfactory. Yet the issue of whether to adopt a completely elective, appointive or merit selection system provokes a great deal of controversy.

Presently, the "elected" judiciary in our large urban areas are not truly elected by the voters, but are de facto appointees.<sup>64</sup> Even in areas where true elective contests do occur, the efficacy of such a selection system is constantly being questioned.<sup>65</sup> The major under-

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tion, the New York City Bar Association, and the New York County Bar Association have all supported reformation measures. See *Selection of Judges*, 171 N.Y.L.J., 30, col. 1 (Mar. 19, 1974); Goldstein, *Judicial Groups Split On Reform*, 171 N.Y.L.J. 1, col. 6 (Mar. 12, 1973).

62. Under this plan an elected chief justice or executive official would appoint judges from a list of candidates that were submitted by an impartial nonpartisan committee that had actively sought out the best people available for such positions. The appointee would serve for a limited term and at certain intervals would be forced to run on his record. The voters would cast their ballots only to determine whether the judge should be retained in his position. If the majority did not vote to retain him, then his position would be filled as before by the selection committee and chief judge. PRESIDENT'S COMMISSION 146; see ASHMAN & ALFINI 11.

63. Kaminsky 503. The following bills regarding judicial selection, discipline, and removal were proposed during the 1974 legislative session: S. 7070; A. 8312; S. 7649; A. 9129; S. 5197; S. 5665; S. 6232; A. 7332; S. 6438; A. 10795; A. 7092; S. 6615; A. 11482; S. 7956; A. 9363; S. 1684; A. 6256; S. 5775; A. 591.

64. ASHMAN & ALFINI 131. New York City judicial candidates often run unopposed and endorsed by all the major parties. *Id.* In a recent Los Angeles County election, only 29 of the county's 300 elected trial court judges campaigned for their positions while 183 ran unopposed. The remainder were appointed by the governor to fill interim vacancies. Beechen, *Can Judicial Elections Express The People's Choice?* 57 J. AM. JUD. Soc'y 242, 243 (1974).

65. See Golomb, *Selection of the Judiciary; For Election*, 28 N.Y.

lying issue in such disputes lies in the public's right to elect its officials. Those who favor the elective system advance the argument, based on the Jacksonian philosophy that to have a truly democratic nation, all public officials including judges should be elected by the people and be accountable to them.<sup>66</sup>

Those who would replace the elective system of judicial selection state that although the Jacksonian concept is in theory appealing, it is not viable in practice as applied to lower echelon public positions.<sup>67</sup> Because the electorate has such little contact with the judiciary and lacks the expertise to assess its qualifications, it is unfair to require the public to pledge their support to men about whom they know little or nothing. The whole purpose of the elective process is to present people with an opportunity to choose from a group of well-known candidates.<sup>68</sup>

However, in both small and large communities, voters all too often cannot even identify by name the judicial candidates for whom they cast their ballot.<sup>69</sup> Assuming that it is possible to over-

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COUNTY LAW ASS'N B. BULL. 514 (1967) [hereinafter cited as Golomb].

66. *Id.* at 514. Although conceding that candidates' nominations are based to a large degree on politics, the proponents of the elective system contend that the majority of judges chosen have proven to be competent; despite the selection system used some bad judges will always enter the system; politics plays a role in any system adopted; politicians have the best knowledge as to who is qualified for such a position in that locality; and that the election systems assure a more representative court. *Id.* at 514-16. *But see* Address by Honorable Howell T. Heflin, Chief Justice, Alabama Supreme Court, National Conference on Judicial Selection and Tenure, Denver, Colo. Mar. 20-22, 1974, on file in the office of the *Fordham Urban Law Journal* [hereinafter cited as Heflin Address]; Niles, *The Changing Politics of Judicial Selection: A Merit Plan for New York*, 22 RECORD OF N.Y.C.B.A. 242, 258-59 (1967) [hereinafter cited as Niles, *Changing Politics*].

67. Winters, *Judicial Selection and Tenure*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 19, 23 (G. Winters rev. ed. 1973).

68. *Id.*

69. Klots, *The Selection of Judges and the Short Ballot*, 38 J. AM. JUD. SOC'Y 134 (1955), in SELECTED READINGS: JUDICIAL SELECTION AND TENURE, 78-82 (G. Winters rev. ed. 1973). A 1955 survey of Buffalo, New York City, and Cayuga County revealed that most voters could not even recall the names of the judicial candidates for whom they voted. In Cayuga County, a small upstate community, only 4% of the voters surveyed could recall one

come this apathetic attitude and educate the public with respect to those who are running, the prohibitive cost in doing so creates additional problems.<sup>70</sup> Furthermore, the costly financing of such campaigns and the requisite courting of political leaders by prospective judicial candidates to obtain the party's nomination at the politically oriented judicial conventions cast a shadow upon the dignity of the judiciary.

Perhaps the greatest failure within the electoral process is that the most qualified individuals are not sought out.<sup>71</sup> Even if such well-qualified individuals were approached, it is doubtful that many would be willing to sacrifice a secure and profitable legal practice to engage in an extensive political campaign, travel across the city, county, district or state to meet an apathetic electorate, and expend extremely large sums of money in order to be elected.<sup>72</sup> In addition, incumbent judges are faced with the problem of either falling behind in their judicial duties or campaign when election time rolls

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judicial candidate they supported at the polls. *Id.* at 80. It has been reported that only 5 per cent of voters in one state's last general election could name two judicial candidates for whom they voted. Address by Peter Roper, Executive Director, Bar Association of Greater Cleveland, National Conference on Judicial Selection and Tenure, Denver, Colo., Mar. 20-22, 1974, on file in the office of the *Fordham Urban Law Journal*.

70. In one recent campaign, some judicial candidates spent close to \$200,000 to be elected. Heflin Address. In New York's own bitterly contested 1973 electoral contest for Chief Judge of the New York Court of Appeals, it has been revealed that the three candidates spent approximately \$640,000 in campaign funds. 57 J. AM. JUD. SOC'Y 237, 238 (Jan. 1974). Los Angeles County candidates seeking trial court positions reportedly have individually spent up to \$54,000 on campaigns. Such exorbitant sums are sure to raise the eyebrows of more than a few individuals, and causes one to wonder where this money had come from and, more importantly, why an individual would expend such an amount to obtain a position that provides a significantly smaller salary. Beechen, *Can Judicial Elections Express The People's Choice?*, 57 J. AM. JUD. SOC'Y 242, 245 (1974).

71. Niles, *Changing Politics* 244-45.

72. See Howell Address. Based on a recent New York City Bar Association study, the long held position of the Association in favor of the merit system for the selection of judges was reaffirmed. See *Selection of Judges* 372.



around in order to remain in office.<sup>73</sup>

Although the Dominick Report presented extensive findings regarding the types and seriousness of judicial misconduct exhibited by certain judges, the Temporary Commission's recommendations to alleviate these problems were effectively limited to the disciplining of judges.<sup>74</sup> The Commission failed to offer any significant proposals with respect to the selection of judicial officers. It attempted to deal with each court separately and concluded that the selection methods should remain essentially the same. The limited appointment of judges by the appropriate executive should continue, but such appointments should be made from a list of candidates submitted by a selection committee.<sup>75</sup> In concluding that the election method should be continued,<sup>76</sup> the Commission, although properly concluding that judicial nominating conventions be eliminated, failed to consider fully the problems of campaign financing, the political pressures exerted on such elected judges, the voters' apathy with respect to judicial posts, and the demeaning effect campaigning has on the dignity of the judiciary.

## 2. Appointment of Judges

Recently, a number of states have adopted or considered proposals to establish some form of legislative or gubernatorial appointive methods of judicial selection similar to those in our country's colonial history.<sup>77</sup> Although there are numerous variations, the three major forms of appointment are: appointment at the sole discretion of a governor, mayor, legislature or executive/legislative board; appointment by governmental executive, chief justice or board subject

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73. The problems inherent in a nonpartisan election are: a candidate is often selected because of his well-known name, pleasant television image or a strategic place on the ballot; no party is left to answer for a nonpartisan candidate's actions while in office; and a large degree of voter apathy has been reported. Howell Address. See also Winters, *Judicial Selection and Tenure*, in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 23-24 (G. Winters rev. ed. 1973).

74. Dominick Report 57-67.

75. *Id.* at 53-56.

76. *Id.*

77. Heflin Address. Currently 11 states have either a legislative or gubernatorial appointive system. *Id.*

to approval by a confirmation committee; and appointment by a governor, board or other body or person from candidates proposed by a nomination committee.

a. Appointment by One Individual or Body

The absolute power to appoint is a selection method tracing its roots to England, which still retains this method. Unlike the United States, the English use of this method has been highly praised by legal scholars.<sup>78</sup>

Despite the political character of the British appointing authority and the absolute discretion exercised by these individuals, English judges and courts have been acclaimed as the finest in the world.<sup>79</sup> One of the major reasons given for this is that England has a divided bar of barristers (trial counsel) and solicitors (office lawyers), and judges are chosen solely from among only the most eminent of barristers.<sup>80</sup> Since only barristers can try cases, the English trial judge has, unlike a number of American judges, an extensive amount of litigation experience.<sup>81</sup> The majority of English appellate judges have also had additional experience as trial judges.<sup>82</sup> In addition, the British tradition with respect to public service has guided the Prime Minister and Lord Chancellor to base their selections on professional and not solely political characteristics, thereby preserving the

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78. Campbell 263; Stason, *Judicial Selection Around The World*, 41 J. AM. JUD. SOC'Y 134 (1957) [hereinafter cited as Stason]. Under the English system the power of appointment is vested in the Lord Chancellor and the English Prime Minister. The Lord Chancellor is the principal judicial officer in England and is the presiding judge and Speaker in the House of Lords, England's highest tribunal. All vacancies in the High Court of Justice and county courts are filled on the Lord Chancellor's recommendation. In addition, justices of certain local London courts are, in effect, appointed and removed by him. The Prime Minister is empowered to appoint: the Lord Chief Justice, the second highest ranking judicial officer; Master of the Rolls; President of the Probate, Divorce and Admiralty Division of the High Court; seven Law Lords; and five Lord Justices. Coldstream, *Judicial Appointments in England*, 43 J. AM. JUD. SOC'Y 41, 42-43 (1959).

79. Welsh, *There Is Room For An Inn*, 49 CAL. ST. B.J. 431, 432 (1974).

80. *Id.* at 432.

81. *Id.* at 434. See also Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection* 36 B.U.L. REV. 1, 32-35 (1956).

82. Welsh, *There Is Room for An Inn*, 49 CAL. ST. B.J. 431, 432 (1974).

independence of the bench.<sup>83</sup>

The traditional objections to the absolute uncontrolled vesting of power in one individual rest upon the attitude of American politicians. Where a governor or mayor is the appointing instrument, the problem of treating judicial appointments as political rewards and payment for political debts is readily apparent.<sup>84</sup>

The political appointor is also subject to social pressure in the selection of his candidates for the bench.<sup>85</sup> Another problem is that the system fails to provide a "regularized method" to seek out in a political way the best or most qualified independent individuals to sit on the bench—rather, the appointees tend to reflect the attitudes and philosophies of the individual who appointed him.<sup>86</sup>

Although a legislative appointive system is presently exercised in four states,<sup>87</sup> this system is relatively unpopular since the legislative members competent to vote intelligently for a judicial candidate are few in number, and political considerations usually sway the vote. Thus, a selected judge may feel obligated to bestow political favors.<sup>88</sup> In addition, strong political influences are evidenced in that the nominee's name comes from the majority party in control.<sup>89</sup>

#### b. California Confirmation Plan

Another method of judicial selection involves the appointments of judges by a governor, mayor or county executive, subject to the

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83. Stason 137.

84. Heflin Address. This is exemplified at our federal level, where judges are appointed by the President subject to confirmation by the Senate, and where the percentage of partisan appointments by recent presidents reads as such: "Franklin Roosevelt—97% Democrat; Truman—92.2% Democrat; Eisenhower—95% Republican; Kennedy—88.9% Democrat; Johnson—94% Democrat." *Id.* See also Winters, *One-Man Judicial Selection*, 45 AMER. JUD. Soc'y 198, 200 (1962), reprinted in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 85 (G. Winters ed., rev. ed. 1973) [hereinafter cited as Winters, *One-Man Selection*]; But see Brown, *A Governor's View of Judicial Selection*, 49 L.A. B. BULL. 405 (1974).

85. Winters, *One-Man Selection* 200. In some instances this may take the form of nepotism. *Id.*

86. Heflin Address.

87. *Id.*

88. *Id.*

89. *Id.*

approval of a confirmation committee. This is an offshoot of the plan adopted by some of the original states which required the governor's appointments to be confirmed by his own council. The main theoretical distinction between the two is that the former is an independent commission while the latter was considered to be a rubber stamp—since all the members of the early governor's councils were appointed by the governor himself.

This plan has recently become popularly known as the California Confirmation Plan, after the first state to adopt it.<sup>90</sup> Although the majority of California judges are selected in nonpartisan elections,<sup>91</sup> the California Constitution provides that the judges for the state's supreme court and court of appeals are to be appointed by the governor contingent upon the approval of a Commission on Judicial Appointments consisting of the Chief Justice, the Attorney General, and a senior presiding justice of the court of appeals.<sup>92</sup> All judges that are appointed and approved are required to run against their record at subsequent elections.<sup>93</sup> This method of appointment has recently received a great deal of attention in New York, as Chief Judge Breitel has suggested that it be adopted and applied in the selection of all New York judges.<sup>94</sup> It is appropriate therefore to evaluate the success of this method in California in order to determine the value of incorporating it into the New York State Constitution.

The California Plan has proven only minimally effective in that state. Admittedly, the Committee has by its mere existence been

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90. Winters, *Judicial Selection and Tenure*, in *SELECTED READINGS—JUDICIAL SELECTION AND TENURE* 25 (G. Winters rev. ed. 1973); Winters, *The Merit Plan For Judicial Selection And Tenure—Its Historical Development*, 7 *DUQUESNE L. REV.* 61, 70 (1968), in *SELECTED READINGS—JUDICIAL SELECTION AND TENURE* 29 (G. Winters rev. ed. 1973). The California Confirmation Plan was adopted in 1934. See Thompson, *Selection of Judges of the California Court of Appeal*, 48 *CAL. ST. B.J.* 381, 424-425 (1973) [hereinafter cited as Thompson]. This plan is now provided for in *CAL. CONST.* art. VI, §§ 7, 16.

91. *CAL. CONST.* art. VI, § 16(c); see Thompson 381.

92. *CAL. CONST.* art. VI, §§ 7, 16; *CAL. ELEC. CODE* §§ 25300-03 (West 1961), as amended §§ 23100-05 (Supp. 1974); see Thompson 425.

93. *CAL. CONST.* art. VI, §§ 7, 16(d).

94. See note 13 *supra*.

able to prevent the appointment of a large number of patently unqualified individuals, yet it has been characterized as merely a "rubber stamp" for the governor's appointments.<sup>95</sup> Verification lies in the fact that "[i]n practice, with one exception over thirty years ago, the Commission always approves the governor's nomination."<sup>96</sup>

Other objections are raised with respect to the impropriety of the Attorney General being a member of the Commission and the inefficacy of the judge running against his own record. Regarding the Attorney General's membership on the Commission, the objection is based on the suspicion that bias may arise in cases before judges whom he has confirmed.<sup>97</sup> It is further alleged that when a judge awaits voter approval on his past record, it is a mere formality since the apathetic voters do not scrutinize a judge's record.<sup>98</sup>

Proponents of the confirmation plan assert that it succeeds in freeing judges from the pressures, expenses, and time demands of campaigning and yet preserves the people's right to remove a judge.<sup>99</sup>

Lack of standards for Commission approval other than the constitutional requirement that an individual be a member of the

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95. Thompson 425. "Almost forty years of operation under this plan of selection . . . demonstrates that, while providing a false veneer of merit selection, the method is one of virtually unrestricted appointment by the governor with all deficiencies inherent in such a system." *Id.*

96. Thompson 382. *See also* Stanton, *Report and Recommendations by Members of Study Section on Judicial Selection*, THE COMMONWEALTH, July 26, 1971, at 3.

97. CALIFORNIA STATE BAR COMMITTEE, RECOMMENDATION FOR IMPROVEMENT IN THE PRESENT SYSTEM OF SELECTION OF APPELLATE COURT JUDGES 9 (1974) [hereinafter cited as COMMISSION RECOMMENDATION]. "The Attorney General, who possesses one-third of the power of the body, is the lawyer for one side in well over half of the cases coming before the Court of Appeal. He has a self-evident interest in the selection of judges likely to rule in his favor. If, as is conceivable, an Attorney General entertains ambition to higher office, a need for support or at least the neutrality of the nominating governor can influence his decision on a nominee." Thompson 426.

98. Campbell 260.

99. Address by Roger J. Traynor, Chief Justice of the California Supreme Court, Meeting of Pennsylvania Bar Association, in 40 CAL. ST. B.J. 677, 685-86 (1965).

bar for ten years is another criticism.<sup>100</sup> The Commission has no obligation to appoint the most qualified candidate.<sup>101</sup> In addition, there is no investigative body to assist the Commission in determining whether an attorney is qualified for a judicial post.<sup>102</sup>

In the wake of this general feeling of dissatisfaction,<sup>103</sup> a number of proposals have been made by the California bar associations, citizens groups, and executive, judicial, and legislative leaders to amend the California Constitution to abolish other forms of selection and to institute the Merit Selection, or Missouri Plan.<sup>104</sup>

c. The Merit Plan for Judicial Selection

The last major appointive method of judicial selection is the increasingly popular Merit, or Missouri Plan.<sup>105</sup> The three basic elements of the merit system are: nomination of qualified candidates by a nonpartisan commission, appointment by the executive, and approval by the voters.<sup>106</sup> The heart of the plan is the nonpartisan nominating commission, which distinguishes it from the strict ap-

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100. Thompson 425.

101. *Id.*

102. *Id.* at 425-26. "The body has generally based its decision upon personal acquaintance by one or more of its members with the person presented by the governor, or upon a most cursory investigation, generally in the form of a few telephone calls." *Id.*

103. "The history of the California Commission on Judicial Appointments confirms the inherent deficiencies in its constitutional charge, manner of operations, and composition. In the almost forty years of its existence, the Commission has rejected only one out of *over 100* gubernatorial nominees—and then on ideological grounds rather than upon lack of professional qualification for the job. The possibility that the governor has always been right in his nominees is belied by the actual performance of some of them." *Id.* at 427.

104. *Id.* at 427-28; Finger, *Annual Report of the Board of Governors*, 43 CAL. ST. B.J. 635, 637-38 (1968); see Reagan, *Judicial Selection In California*, 42 L.A.B. BULL. 555 (1967); Stanton, *Why I Am For The California Merit Plan*, 42 CAL. ST. B.J. 356 (1967); Sutro, *Merits of the Merit Plan for Judicial Selection*, 42 CAL. ST. B.J. 249 (1967).

105. Prior to 1950, only Missouri had this form of judicial selection. Today twenty-one states and the Commonwealth of Puerto Rico, the District of Columbia, and the territory of Guam have implemented the Merit Selection System in whole or in part. See ASHMAN & ALFINI 2.

106. *Id.* at 11.

pointive and elective systems as well as from the California Confirmation Plan and Bar Association Review Commission.<sup>107</sup>

Contrary to what its popularly known title implies, the Missouri Plan does not apply to the selection of judges throughout Missouri. While mandatorily imposed with respect to the selection of state appellate court judges, it is applicable to only the trial courts in the city of St. Louis and Jackson County, the state's two most populated centers.<sup>108</sup>

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107. *Id.* at 12. Prior to February 23, 1975, the only Merit Plan commission which existed in New York State was the New York City Mayor's Committee on the Judiciary which was voluntarily adopted in 1962 by Mayor Wagner. *Id.* at 132. This committee has continued in existence under the Lindsay and Beame administrations. The committee's authority is limited to recommending nominees for judicial appointments by the Mayor to New York City's Criminal and Family Courts for ten year terms and the Civil Court for interim vacancies only. *Id.* at 131. The present committee is composed of a total of twenty-four members: thirteen members are selected by the two New York City appellate division presiding justices; and eleven members are selected by the mayor. The members serve terms concurrent with the mayor's term. *Id.* at 35, 130-38. In New York, the New York City Bar Association has served an important role in the selection of judges through its veto power over the Commission. *Id.* at 82-83. Consequently, candidates must receive the dual approval of the Mayor's Committee on the Judiciary and the New York City Bar Association prior to receiving the mayor's appointment. *Id.* at 82-84, 139-141. The Bar Association's Judiciary Committee and subcommittees on criminal, family or civil courts conduct investigations and interviews of prospective candidates. *Id.* at 83. At the conclusion of such investigations and interviews, a joint meeting between the Judicial Committee and the pertinent subcommittee is held to approve or disapprove the application. *Id.* If a disagreement between the Mayor's Committee and Bar Association Committee arises, a joint subcommittee is established "to determine whether either committee had information that was not available to the other." *Id.* After the joint subcommittee meets, reports are presented to the Mayor's Committee and Bar Association Judicial Committee, and some conclusion is reached. *Id.* Under the Lindsay administration, from 1966 to 1973, the New York City Bar Association was initially assigned an advisory role in the selection process, and later, during Mayor Lindsay's second term, the mayor agreed not to appoint any candidate without the Bar Association's approval. *Id.* at 82-83.

108. MO. CONST. art. V, § 29(a). The plan applies only to the State Supreme Court, courts of appeal, and trial courts in St. Louis, but the

The primary purpose of the Missouri Plan is the maintenance of a thoroughly qualified and independent judiciary by taking the selection and tenure of judges out of politics.<sup>109</sup> The plan was founded upon the basic mistrust of strict elective and appointive systems.<sup>110</sup> It inserts a theoretically nonpartisan nomination committee between the governor and the initial nomination.<sup>111</sup>

The commission presents nominees from which the governor or executive selects the judge. The commission's membership consists of attorneys, laymen, and judges, each serving for a six year staggered term.<sup>112</sup> The commissioners are prohibited by law from holding any public or political party office while serving as commission members.<sup>113</sup> Such a restriction is meant to assure that partisan considerations play a minimum role in the selection of nominees, that the commission member's duties are limited to selecting candidates, and that the commission is insulated from the pressures of the other branches of government.<sup>114</sup>

The governor must select one of the three candidates chosen by the commission and appoint the selectee for a one year term.<sup>115</sup> Even

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constitution permits other localities to adopt it. *Id.*

109. See Hyde, *The Missouri Method of Choosing Judges*, 41 J. AM. JUD. SOC'Y 74 (1957), in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 91 (G. Winters rev. ed. 1973).

110. Address by John Krusl, Jr., National Conference on Judicial Selection and Tenure, Mar. 20-22, 1974, on file in the office of the *Fordham Urban Law Journal*.

111. *Id.* There are three types of judicial selection commissions in Missouri: The Appellate Judicial Commission, four Judicial Circuit Commissions, and a Municipal Judicial Nominating Commission. ASHMAN & ALFINI 33.

112. Mo. CONST. art. V, §§ 29(a), (d) (the relevant Missouri constitutional provisions). The purpose of the staggering and six year terms is to prevent control over the commission by the executive who makes appointments from the candidates nominated. Campbell 261.

113. Mo. CONST. art. V, § 29(d); see Campbell 261.

114. Campbell 261.

115. Mo. CONST. art. V, §§ 29(a), (c)(1); see Campbell 261-61. In New York City, the role played by the New York City Bar Association has been criticized because the Bar Association is responsible to no one in the community for its actions, the Association Committee members' decisions are not formally structured, and the membership of the Bar Association's



if the governor were continually to select a nominee from his party, the individual chosen would still be one of the most highly qualified candidates for the position.<sup>116</sup> At the conclusion of this one year term, the judge must run against his record for a twelve year term.<sup>117</sup>

The major strength of the plan lies in the nominating commission. To the extent that it is a dedicated nonpartisan commission it will be able to seek out the most exceptionally qualified individuals to serve as judges and eliminate the mediocre who have in the past otherwise been elected or appointed. The commission is expected:

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Judicial Committee is not broadly representative of the community or bar association itself. ASHMAN & ALFINI 84. In addition, the "analytic justification for a grant of veto power to the bar association is no stronger than that of any other special interest group" and may result in suspicions of self interest and impropriety. *Id.* at 84.

116. Mo. CONST. art. V, § 29(a) (three nominees to be selected in order to insure the governor has a reasonable choice).

117. *Id.* § 29(c)(1). The Ashman study concluded that in New York the "committee serves primarily as a screening body not as a selecting body." ASHMAN & ALFINI 146. This conclusion was based on the finding that the Commission accepts the majority of nominations from the Mayor's Office. It is further evidenced that while sixty-two of the three hundred candidates approved were deemed exceptionally well-qualified, only twenty-six of these were chosen to fill the 156 appointments made by Mayor Lindsay. Consequently, 130 judges were appointed who were only deemed "qualified" while thirty-six exceptionally well-qualified individuals were not appointed. *Id.* at 146-47. Numerous studies of the Missouri Plan have been conducted. These studies have uniformly concluded that the implementation of the plan has resulted in a more highly qualified judiciary. See, e.g., Campbell; Collett, *A History of the Selection and Tenure of Supreme Court Judges In Missouri*, MO. HIST. REV. 439 (July 1965); Niles, *Changing Politics*; Roberts, *Twenty-Five Years Under the Missouri Plan*, 3 GA. ST. B.J. 185 (1966); Watson, *Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges*, 52 A.B.A.J. 539 (1966). "The plan is viewed very favourably and seems to have been a significant reform. Crossing of party political boundaries has become usual and indeed politicians appear neither to be directly involved in, nor even to try to influence, the system. The plan is said to combine the idea of accountability to the electorate with an intelligent method of electing qualified candidates; it is also argued that the judge is given incentive insofar as he will have to run for (re)election on his record—but it will be his own record that counts and not that of his political party or that of an 'opponent.'" Campbell 261.

to play an 'activist' role in recruiting and screening candidates while operating with sufficient dignity so as not to cause capable lawyers to become 'turned off' and refuse to be candidates for judicial office. Also, the commission must operate in a manner which will insure that the selection process will deserve and receive public respect and trust.<sup>118</sup>

The composition of such a commission membership and the activities carried on by it are crucially important. However, a recent survey has indicated that the present composition of the nominating commissions are not adequately representative of a fair cross section of our society.<sup>119</sup>

Additional objections by opponents of the plan are based on the same theories presented earlier by proponents of the elective system.<sup>120</sup> Other objections relate to the propriety of including laymen on commissions, retention of the requirement that judges run on their records, the methods of selection implemented by the commissions, and standards used to rate candidates.<sup>121</sup>

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118. Address by Allan Ashman, Director of Research, American Judicature Society, National Conference on Judicial Selection and Tenure, Mar. 20-22, 1974, (on file in the office of the *Fordham Urban Law Journal*) [hereinafter cited as Ashman Address].

119. Of the 371 commissioners responding to the the Ashman survey, 97.8% were white, 89.6% were male, and only eight belonged to minority races. Almost 50% of the commissioners were lawyers, 5% were judges, and 45% laymen. Twenty-seven per cent of the lay members were business executives, 8% educators, 5% journalists, 4% medical professionals, and the remainder ranged from ranchers to housewives. Politically, the Commission did possess a bi-partisan flavor with 47.9% being Democrat and 45% Republicans. ASHMAN & ALFINI 38-39.

120. See note 69 *supra* and accompanying text. See also Buesser & Kopel, *Judicial Appointment or Judicial Election—Election*, 41 DET. LAW. 9 (Sept. 1973); Kratz, *Will the "Merit" Plan Destroy California's Balanced Constitutional Government?*, 43 L.A.B. BULL. 378 (1968); Mullinax, *Judiciary Revision—An Argument Against The Merit Plan For Judicial Selection and Tenure*, 5 TEXAS TECH. L. REV. 21 (1973); Roth, *Why I Am Against The California Merit Plan, the Missouri Plan—Or Any Reasonable Facsimile Thereof*, 42 CAL. ST. B.J. 346 (1967); Ruebel 270-76.

121. Suggestions for improving the Merit Selection Systems are found in: Nelson; Robertson & Gordon, *Merit Screening of Judges In Massachusetts: The Experience of the Ad Hoc Committee*, 58 MASS. L.Q. 131 (1973); Ashman Address; Address by Stuart A. Summit, Executive

Those who criticize the participation of lay membership fail to realize that the mere presence of such individuals creates a confidence in the commission's actions and motives. In addition, the public voice in such selections cloaks the commission with an aura of public trust.<sup>122</sup>

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Director, Mayor's Committee on the Judiciary, National Conference on Judicial Selection and Tenure, Denver, Colo. Mar. 20-22, 1974 (on file in the office of the *Fordham Urban Law Journal*). In concluding its report, the American Judicature Society in its Ashman Study evaluated the New York City's merit selection plan in comparison with the true merit selection system, or Missouri Plan. The first criticism stemmed from the voluntary nature of the New York City committee. Since it serves at the pleasure of the elected official in office, it can be abolished at any time. This weakens the committee's independence and impedes the development of procedural regularity and accountability. Despite the objection of the possible impingement on the committee's independence, the report indicates that in recent years "[w]hile the mayor's office has been the source for many of the candidates reviewed and can exert substantial influence, it is evident that the committee has not simply rubber stamped the mayor's decision." ASHMAN & ALFINI 146. Although Mayor Wagner's committee attempted to follow some form and standards of selection, the Lindsay committee proceeded on an admittedly ad hoc basis. Without such criteria there is no way to determine what constitutes a qualified or unqualified individual. *Id.* at 133-35. The Ashman study has made the following recommendations as necessary to the improvement of the New York City version of the merit selection plan: "First, the 'voluntary' plan should be formalized by statute or 'executive' order so that the mayor's committee is established by law. Second, the 'veto' power of the bar association should be eliminated. Third, the mayor should be required to appoint all available candidates rated 'exceptionally well qualified' before dipping into the pool of candidates rated as qualified. Pooling candidates makes eminently good sense in New York City, particularly when the mayor's committee is confronted with the task of filling hundreds of judicial positions. However, it is inconsistent with the tenets of merit selection, and ultimately weakens the quality of the judiciary, for the very best candidates to be arbitrarily passed over in favor of less qualified people." *Id.* at 150. To fully appreciate such recommendations it is necessary to understand the success of the Missouri Plan, the yardstick by which the New York City voluntary plan was measured. Although there are minor variations in merit plans that have been adopted by the different states and localities, the model for the majority of the jurisdictions has been the thirty-four year old Missouri Plan.

122. Clark Address.

Despite the additional objections to and shortcomings of the merit nonpartisan selection system, it is clearly superior to the strict elective and appointive systems and presents us with a starting point to obtain the "most exceptionally qualified" individuals to serve on our benches. It is by the continued reevaluation of such selection methods that such merit systems will be upgraded to a point where they are a truly representative body, devoid of any political influence, and empowered with the necessary methods and means to select the "most exceptionally qualified" individuals to serve on our judicial tribunals.<sup>123</sup>

d. Governor Carey's Voluntary Merit Selection System

On February 23, 1975, Hugh Carey, New York's newly elected governor, established a voluntary judicial merit selection system.<sup>124</sup> By executive order, the Governor created a number of judicial nominating committees and bound himself to appoint only those individuals recommended for judicial posts by such committees.<sup>125</sup> The committees will nominate individuals for permanent judicial positions in the appellate division's four departments and the court of claims, as well as for interim posts in the court of appeals, supreme, county, family, and surrogates courts.<sup>126</sup>

The order establishes a committee for each of the four appellate division departments and each county.<sup>127</sup> A statewide committee will deal with appointments to the court of claims and interim positions on the court of appeals.<sup>128</sup> Each committee is charged with the duty of examining the qualifications of all attorneys proposed by any person or organization.<sup>129</sup> At the completion of its investigations the committee will submit to the governor a report containing the names of all individuals deemed "well qualified" by a majority of its membership.<sup>130</sup> In addition, a summary of each nominee's quali-

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123. SELECTED READINGS: JUDICIAL SELECTION AND TENURE 216 (G. Winters rev. ed. 1973).

124. Exec. Order No. 5, Press Release from Governor Hugh L. Carey, Albany, N.Y., Feb. 24, 1975.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

fications must be presented to the governor and released to the public simultaneously with the announcement of the final selection.<sup>131</sup>

Each of the four appellate division department nominating committees is to have eleven members.<sup>132</sup> The governor and chief judge of the court of appeals are each to appoint four members, no more than two of whom can be of the same party and no more than two of whom can be laymen.<sup>133</sup> The presiding justice of the concerned appellate division is allowed to appoint one lawyer.<sup>134</sup> The four leaders of the state's legislature are to appoint jointly two members of whom no more than one can be a nonlawyer, and each must be of a different political party.<sup>135</sup> The governor has retained the right to appoint the committees' chairmen.<sup>136</sup>

The state judicial nominating committee is to consist of twelve members.<sup>137</sup> The membership is to be composed of the four appellate division departmental nominating committee chairmen and two members of each of the four appellate division departmental committees, who are of different political parties and one of which must be a lawyer.<sup>138</sup> Each departmental committee is to choose which two of its members will sit on the statewide committee. The statewide committee members will select their own chairman.<sup>139</sup>

Each county committee is composed of the members of the appellate division departmental nominating committee in which the county is located plus two additional members, appointed by the county executive or the mayor of New York City.<sup>140</sup> The chairman of the appropriate appellate division departmental committee is to serve as the chairman of the county commission.<sup>141</sup> The state judi-

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131. *Id.* Copies of such reports must also be presented to the state senate where such appointments are required to be confirmed. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* One of the two members appointed by the mayor or executive official must be a layman. *Id.*

141. *Id.*

cial nominating committee is charged with promulgating the rules and regulations which will govern all the committees.<sup>142</sup>

The members of these committees may not be public or judicial officials nor officers of a political party.<sup>143</sup> Although the members serve without compensation,<sup>144</sup> they are reimbursed for all necessary expenses incurred and are provided with a paid staff to investigate the qualifications of prospective candidates.<sup>145</sup>

Even though the effectiveness of the Governor's plan cannot be determined until it has actually been in operation for a period of time, it is possible to project the probable future success of the system by a comparison of its structure and provisions with the highly favored Missouri Plan<sup>146</sup> and the less effective New York City Mayor's Committee On The Judiciary.<sup>147</sup>

Similar to the New York City Mayor's Plan,<sup>148</sup> the Governor has limited the selection system to a two step process, that of an initial selection of individuals by a nomination committee and final appointment by the executive. Unlike the Missouri Plan,<sup>149</sup> voter approval is not required. As a consequence of voter apathy, the elimination of the latter requirement should not have a profound effect on the ultimate success of the system.<sup>150</sup>

Since the heart of any merit selection system is the nominating commission,<sup>151</sup> the membership standards and the committees' composition must be closely scrutinized. Although the Governor will apparently succeed in instilling the essential nonpartisan flavor within the four appellate division departmental and the county nominating committees by assuring at least a substantially bipartisan membership,<sup>152</sup> it would appear that the state judicial nominat-

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See text accompanying notes 105-23 *supra*.

147. See notes 107, 115, 117 *supra*.

148. See note 107 *supra*.

149. See note 117 and accompanying text.

150. See note 69 *supra* and accompanying text.

151. See note 107 *supra* and accompanying text.

152. This requirement that a committee have a bipartisan composition guarantees that the committee will not be dominated by one political party and thereby avoids the danger of strictly partisan selections. Ruebel 271.

ing committee will not enjoy such independence. The Governor, by retaining the right to appoint the four appellate division departmental committee chairmen, who in turn will form one-third of the statewide committee's membership, has theoretically retained the power to substantially influence the state committee's final nominations and to prevent an independent and nonpartisan committee from existing.

Like the Missouri Plan,<sup>153</sup> the inclusion of a substantial number of laymen on the governor's committees will help to create a public trust in the commission's work, assuring that the public has maintained a voice in the selection of its judicial officials. In addition, the prohibition against members being public or judicial officials or political party officers should further ensure, as does the Missouri Plan,<sup>154</sup> that partisan politics play only a minimal role in nomination and give added public respect to the committee by insulating its members from the pressures of other governmental branches and political parties. Since the members serve without compensation and may not be appointed to a judicial office until at least one year after termination of their committee membership, it is apparent that such a position will not be given as a political or social reward.<sup>155</sup>

Unlike the New York City Mayor's Committee,<sup>156</sup> the governor's committees are not subject to any veto power held by a state or city bar association committee, thereby avoiding the criticisms associated with such a dual system.<sup>157</sup> However, the major criticism of the voluntary nature of the Mayor's Plan still exists with respect to the governor's committees.<sup>158</sup> Since the governor's committees can be abolished at any time, by another executive order, the uncertainty of its continued existence may weaken the committee's inde-

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153. See text accompanying note 122 *supra*.

154. *Id.*

155. Under the Missouri Plan the members likewise receive no salary and are compensated only to the extent of traveling and other expenses incurred in furtherance of their duties. Mo. CONST. art. V, § 29(d).

156. See note 107 *supra* and accompanying text.

157. See note 115 *supra* and accompanying text.

158. *Id.* Although the governor's plan is more stable than the mayor's because it was established by an executive order, it can only be assured of continued existence by the adoption of a constitutional amendment providing for such a system.

pendence and restrict the development of procedural regularity and accountability.<sup>159</sup>

By limiting his selection to those individuals characterized as "well qualified" by the various committees, the Governor has given added assurance—not found under the Mayor's Plan<sup>160</sup>—that only qualified individuals will be selected. Although the standards used to determine who is "well qualified"<sup>161</sup> remain to be established, the publication of all the nominees' qualifications indirectly subjects these standards to public scrutiny and gives the additional assurance that qualified individuals—and not political hacks—will be selected.

To the extent that the governor's committees do not in practice serve as a mere screening body for his appointments,<sup>162</sup> accepting and nominating only those proposed nominees submitted by the governor or political parties, they will constitute a step forward in restoring the public's confidence in our judiciary. Yet the Governor's merit selection system is limited to those few appointments that can be constitutionally made by the governor and is voluntary in nature; it therefore fails to fully insure that qualified individuals will continually be sitting on all state court benches. Since the governor appoints<sup>163</sup> only twelve percent<sup>164</sup> of New York judges, the remaining posts being filled by the electoral process, the practical impact of the plan is minimal.

#### IV. Conclusion

Although Chief Judge Breitel's proposals for court reform and Governor Carey's recent executive order creating a voluntary merit

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159. See text accompanying note 121 *supra*.

160. See note 117 *supra*. This is the same criticism that has been leveled against the California Confirmation Plan. See notes 100-01 *supra* and accompanying text.

161. An in-depth discussion on the problems incurred when establishing such standards is presented in Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 TEXAS L. REV. 1063 (1966), in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 1 (G. Winters rev. ed. 1973).

162. This was one of the major criticisms of the mayor's committee. See note 117 *supra*.

163. The governor's power to appoint judges is found in N.Y. CONST. art. 6, §§ 2(c), 4(c)-(e), 9, 21(a)-(b).

164. N.Y. Times, Mar. 2, 1975, § 4, at 8, col. 1 (editorial).



selection system are significant advancements toward the revitalization of the New York court system and the reestablishment of public confidence in our judicial system, only the continuous pressures exerted by our citizens' groups, bar associations, and the judiciary itself will stir a long sleeping New York legislature into adopting the needed constitutional amendments to assure that all of New York's judicial positions will continually be filled by the most qualified individuals. Due to the success of the Merit Selection Plan, adoption of a constitutional amendment incorporating such a system would be of greater benefit than the California Plan or any other system.

Recent American history has shown the vital importance of a strong and independent judicial system. It is the judiciary which is the key factor in the administration of justice, and it is with the judge that any reforms must begin.

*James Edward Lozier*